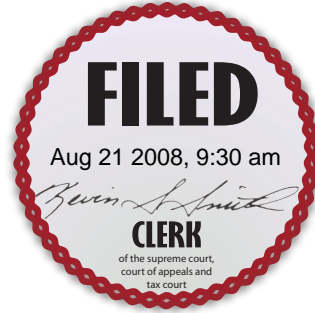


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



ATTORNEY FOR APPELLANT:

**JOHNNY W. ULMER**  
Elkhart, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ANN L. GOODWIN**  
Special Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

HERBERT S. FOUST,  
Appellant-Defendant,

VS.

STATE OF INDIANA,  
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)

No. 20A05-0801-PC-18

APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry C. Shewmaker, Judge  
Cause No. 20C01-0702-FC-4

**August 21, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Herbert S. Foust appeals the denial of his petition for post conviction relief, in which he requests credit for earning his GED. We dismiss.

### **FACTS AND PROCEDURAL HISTORY**

Foust pled guilty to robbery, a Class C felony.<sup>1</sup> On March 1, 2007, the trial court accepted the plea agreement and sentenced Foust to eight years. On June 5, 2007, Foust filed a *pro se* petition for post-conviction relief, alleging he had completed his GED, but was not awarded credit time.

On August 30, 2007, a hearing was held on Foust's petition. Foust stated he had earned a diploma on May 3, 2007, while he was incarcerated at the Marshall County Jail. According to Foust, he was transferred to the Department of Correction ("DOC") on June 1, 2007. Foust asserted he received a note from a DOC official stating:

It would appear that you should have received credit time for your GED; however, you received your GED prior to being received at this facility. Therefore, MCF<sup>[2]</sup> would not grant you this time. You should apply through your sentencing court for this credit.

(Tr. at 12.) The court asked Foust if he had brought the issue to the attention of the Marshall County Sheriff, and Foust replied, "The case was dismissed in Marshall County." (*Id.*)

The court determined the credit should be awarded by the DOC and therefore denied Foust's petition. Foust was appointed counsel and now appeals.

---

<sup>1</sup> Ind. Code § 35-42-5-1.

<sup>2</sup> MCF appears to stand for Miami Correctional Facility.

## DISCUSSION AND DECISION

The trial court determines the initial credit time when an offender is sentenced. *Members v. State*, 851 N.E.2d 979, 982 (Ind. Ct. App. 2006). When educational credit is earned after sentencing, the credit due to the offender is determined by the DOC or the jailing authority. *Id.* at 982-83. If educational credit is denied, the offender must exhaust administrative remedies with the DOC or jailing authority. *Id.* at 983. When administrative remedies are exhausted, the offender may seek judicial review via a petition for post-conviction relief. *Young v. State*, 888 N.E.2d 1255, 1256 (Ind. 2008). In *Young*, our Supreme Court addressed the showing an offender must make to be granted educational credit in a post-conviction proceeding:

Here, for example, *Young* must show in the first place what the relevant DOC administrative grievance procedures are, and then that he has exhausted them at all levels. *Young* must also present evidence of his diploma and the credentials of the school that awarded it. He must show that he meets each requirement of any necessary statute (for example, I.C. § 35-50-6-3.3).

*Id.* at 1257.

Foust testified he was at the Marshall County Jail until June 1, 2007, when he was transferred to the Miami Correctional Facility. The State notes that in a filing dated April 19, 2007, Foust provided an address at Westville Correctional Center. (Appellant's App. at 61.) Therefore, it is not clear where Foust was when he earned his diploma. However, it is clear his diploma was earned after he was sentenced. Therefore, the trial court could not award credit time unless Foust demonstrated he exhausted his remedies with the Jail or the DOC.

Foust testified he addressed his concerns to both the Jail and the DOC, but that testimony falls short of the showing required by *Young*. Foust did not explain the administrative procedures he pursued or demonstrate that the note he received was a final decision by the relevant authority.<sup>3</sup> Because Foust has not demonstrated he exhausted his administrative remedies, we must dismiss. *See Members*, 851 N.E.2d at 983 (post-conviction court lacks jurisdiction when offender has not exhausted administrative remedies). Foust should determine where he was incarcerated on the date he earned his diploma and follow that facility's procedure for determining credit time. If he receives a final decision denying educational credit, he may then file a petition for post-conviction relief and should be prepared to make the showing described in this opinion.

Dismissed.

MATHIAS, J., and VAIDIK, J., concur.

---

<sup>3</sup> Foust's appendix includes several documents, such as his diploma and the note he quoted at the hearing, which were attached to his notice of appeal. These documents were not admitted at the hearing and are not part of the record; therefore, we have granted the State's motion to strike these documents. Even if we were to consider these documents, we would not be able to conclude Foust had exhausted his administrative remedies. We cannot tell who wrote the note, nor are we certain where Foust was incarcerated when he earned his diploma.